



## STATE OF WISCONSIN Division of Hearings and Appeals

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In the Matter of

Outagamie County Department of Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 203377

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Pursuant to petition filed October 8, 2021, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Outagamie County Department of Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Tuesday, December 7, 2021 at 08:30 AM by telephone. The hearing was first scheduled to occur by telephone on November 18, 2021 at 9:00AM. At that time, the undersigned administrative law judge (ALJ) called Respondent at her telephone number of record. Respondent answered the phone but indicated that she was not available to participate in the hearing and asked that the hearing be rescheduled at 8:30AM on a different date to accommodate her work schedule. That request was granted. At the time of the rescheduled hearing, Respondent did not appear.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Outagamie County Department of Human Services

320 S Walnut St

Appleton, WI 54911-5985

By: ██████████, Fraud Investigator

Respondent:

██████████  
██████████  
██████████

Did Not Appear

ADMINISTRATIVE LAW JUDGE:

Teresa A. Perez

Division of Hearings and Appeals

## FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Outagamie County who received FS benefits from 2018 through 2021 as the primary person in a multi-member household. In June 2019, the agency noted that [REDACTED] was not a member of Respondent's household. Ex. 3A
2. On June 14, 2021, Respondent attempted to use [REDACTED] EBT card to make a purchase at a [REDACTED] in Appleton, Wisconsin but was unable to complete the transaction because she entered an incorrect PIN. She then used her own EBT card to make the purchase. On June 20, 2021, Respondent used [REDACTED] EBT card to make a purchase at a [REDACTED] in Appleton, Wisconsin. Because that card did not have sufficient funds to pay for the entire bill, she used her EBT card to complete the purchase. Exs. 3A4, 3A5, 3A6, 5, and Testimony of [REDACTED].
3. On January 9, 2018, February 8, 2019, December 5, 2019, and September 22, 2020, the agency mailed Respondent Enrollment and Benefits booklets which included information regarding FS program rules and regulations and identified actions considered to be intentional program violations by the agency including "using another person's FoodShare benefits, identification card, or other documentation." Exs. 2 and 3A.
4. On October 8, 2021, Fraud Investigator [REDACTED] met with [REDACTED] and he acknowledged that he has allowed his girlfriend, the respondent, to use his FoodShare card to make purchases when she has insufficient funds to help her out. Testimony of [REDACTED].
5. On October 12, 2021, the petitioner/agency prepared an Administrative Disqualification Hearing Notice alleging that Respondent misused [REDACTED] FoodShare card and advising her that a hearing would take place on November 8, 2021 at 9:00AM by telephone. At that time, Respondent asked that the hearing be rescheduled.
6. Pursuant to Respondent's request, the hearing was rescheduled for a later date. On November 18, 2021, a hearing notice was mailed to Respondent advising her that the hearing would occur by telephone on December 7, 2021 at 8:30AM.
7. The respondent failed to appear for the scheduled December 7, 2021 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

## DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;  
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

*FoodShare Wisconsin Handbook*, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An individual who is shown to have committed an IPV can be disqualified from participation in the FS program. The length of the disqualification period depends, in part, on the nature of the IPV. See 7 C.F.R. § 273.16(b). Generally, an individual will be disqualified for twelve months after committing her or his first IPV. See 7 C.F.R. § 273.16(b)(1)(i). The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. 7 C.F.R. §273.16(e)(4) provides that an administrative disqualification hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The hearing in this matter, as detailed in the Preliminary Recitals, was rescheduled once at Respondent's request; however, Respondent did not appear at the time of the rescheduled hearing. A hearing notice that was sent to Respondent instructed her to provide the undersigned administrative law judge with a telephone number where she could be reached for the rescheduled hearing. She did not do so. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at the hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

*Kuehn*, 11 Wis.2d at 26.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power. "Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that "it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable." 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992.)

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence. In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The agency contended that the Respondent committed an IPV by using [REDACTED]'s EBT card. The agency provided sufficient documentary evidence to establish that the respondent unsuccessfully attempted to use [REDACTED]'s EBT card to make a purchase on June 14, 2021 and that she used both of their EBT cards to pay for \$244.27 worth of groceries on June 20, 2021. The agency also presented credible evidence that both the respondent and [REDACTED] have denied being part of the same household. In addition, Fraud Investigator [REDACTED] testified that she met with [REDACTED] on October 8, 2021 and that, at that time, he acknowledged that he and the respondent "help each other out" and that if one of them has insufficient funds, they will allow the other to make purchases with their FoodShare card.

Pursuant to federal regulation, eligible food program benefits may be used only by a FS household or by an individual the FS household selects to purchase eligible food *for the household*. 7 C.F.R. §274.7(a). And, pursuant to state statute, an "unauthorized person" is prohibited from knowingly using FS benefits. Wis. Stat. §946.92(2)(f). "Unauthorized person" is defined to include a person who is not an eligible person. Wis. Stat. §946.92(2)(e)3. Consistent with the above-cited federal regulation and state statutes, FS policy states:

The cardholder is the only person that can make authorized purchases on the QUEST card, unless he or she verbally authorizes another person to make purchases on their behalf for their assistance group.

[Emphasis added.] *FoodShare Wisconsin Handbook* §7.3.2.4.

The agency demonstrated that Respondent, who had a FoodShare case open in his own name at the time she used [REDACTED] EBT card in June 2021, was previously advised in writing of the prohibition on using other people's EBT cards and the penalties associated with FS program rule violations. It is thus reasonable to infer that Respondent understood both that the FS benefits issued to her were the benefits to which she was entitled and that she was violating FS program rules when she used benefits issued to someone else.

Based upon the record before me, I find that the agency established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

### **CONCLUSIONS OF LAW**

1. The respondent violated, and intended to violate Wis. Stat §946.92(2)(f).
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

**NOW, THEREFORE, it is ORDERED**

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a **first** IPV of the FoodShare program and disqualify the respondent from the program **for one year**, effective the first month following the date of receipt of this decision.

### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

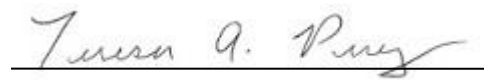
In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

## APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

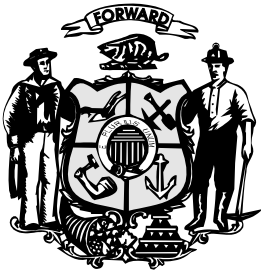
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,  
Wisconsin, this 31st day of January, 2022

A handwritten signature in cursive script, reading "Teresa A. Perez", written over a horizontal line.

\sTeresa A. Perez  
Administrative Law Judge  
Division of Hearings and Appeals

c: East Central IM Partnership - email  
Public Assistance Collection Section - email  
Division of Medicaid Services - email  
[REDACTED] - email



## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on January 31, 2022.

Outagamie County Department of Human Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[REDACTED]